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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

November 8, 1993

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

OUR FILE NO.
1162-101-63

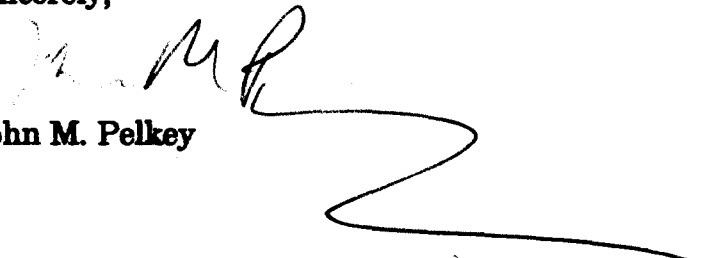
Re: Docket No. 93-158
RM No. 8239

Dear Mr. Caton:

Transmitted herewith on behalf of Donald B. Brady are an original and four copies of a Reply To Opposition To Contingent Motion For Leave to be filed in the above-referenced proceeding.

If there are any questions concerning this submission, please contact this office directly.

Sincerely,


John M. Pelkey

JMP:jb

Enclosures

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NOV. - 8 1993

Before The

Federal Communications CommissionFEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Washington, D.C. 20554

In The Matter Of

Amendment of Section 73.202
FM Table of Assignments
(Utica, Hazelhurst and Vicksburg,
Mississippi)Docket No. 93-158
RM-8239

To: Chief, Policy and Rules Division

**REPLY TO OPPOSITION TO
CONTINGENT MOTION FOR LEAVE**

Donald B. Brady, through counsel, hereby replies to the opposition filed by Crossroads Communications, Inc., ("Crossroads") and the joint opposition filed by Saint Pe' Broadcasting, Inc., and Willis Broadcasting Corp. ("St. Pe'") with respect to Mr. Brady's "Contingent Motion for Leave" filed in the above-captioned proceeding. For the reasons set forth below and in Mr. Brady's motion, the Commission either should treat Mr. Brady's expression of interest as timely filed or, alternatively, should grant Mr. Brady leave *nunc pro tunc* to file the expression of interest.

I. BACKGROUND

On October 12, 1993, Donald B. Brady filed a Contingent Motion for Leave in the above-referenced proceeding. Mr. Brady's Motion was prompted by reply comments that had been filed wherein Crossroads and St. Pe' suggested that Mr. Brady's expression of interest filed with respect to the proposed substitution of Channel 265C3 for Channel 225A at Utica, Mississippi, was untimely. In Mr. Brady's view, his expression of interest had been timely filed.

His expression of interest had been submitted to the Commission well before the date established for the submission of reply comments and neither the Notice of Proposed Rule Making nor the Commission's Rules specified or required that competing expressions of interest be filed any earlier than the date on which reply comments were required to be filed. Moreover, even assuming that expressions of interest were required to be filed by the comment due date, Mr. Brady's expression of interest was delivered to the Commission on that date and thus was timely. Being of the opinion that his expression of interest was timely filed and not having been represented by counsel, Mr. Brady saw no need to accompany his expression of interest with a motion seeking leave to file it. After reviewing the reply comments and realizing that both St. Pe' and Crossroads were contesting the timeliness of his submission, Mr. Brady retained counsel and filed the motion that both Crossroads and St. Pe' are now opposing.

II. NEITHER CROSSROADS NOR ST. PE' HAVE DEMONSTRATED THAT EXPRESSIONS OF INTEREST WERE REQUIRED TO BE FILED BY THE COMMENT DUE DATE.

Crossroads' argument is primarily premised on the claim that competing expressions of interest were required to be filed in comments rather than in reply comments. Significantly, Crossroads is unable to point to any language in the Notice of Proposed Rule Making or any Commission rule that supports this claim. The best that Crossroads can do is to refer to the so-called "Cheyenne Doctrine" in alleged support of the proposition that competing expressions of interest must be filed by the comment due date.¹ In fact, the Cheyenne Doctrine makes no distinction between comments and reply comments and

¹ See *Cheyenne, Wyoming FM Allocation*, 60 FCC 2d 63, 38 RR2d 1665 (1976).

does not specify whether competing expressions of interest must be filed by the comment due date, rather than by the reply comment due date. Similarly, Crossroads asserts that the alleged requirement that expressions of interest be filed by the comment due date was "codified" by the Commission in MM Docket No. 83-1148.² Once again, however, a review of the cited proceeding reveals that Crossroads' claim is without basis. As was true with respect to the Cheyenne, Wyoming decision, the Commission's decision in Docket No. 83-1148 makes no distinction between comments and reply comments. Perhaps most telling, despite Crossroads' claim that Docket No. 83-1148 "codified" the requirement that competing expressions of interest must be filed by the comment due date, rather than the reply comment due date, Docket No. 83-1148 adopted no regulations whatsoever with respect to the timing of the filing of expressions of interest. The Commission has held that a rule that is adopted in a rule making cannot be enforced if the rule, even through inadvertence, fails to appear in the Federal Register. *See Nelson Broadcasting Corporation*, 6 FCC Rcd. 1765 (1991). That being the case, it almost goes without saying that a so-called "rule" cannot be enforced against a party, particularly a *pro se* party, if the rule not only has never appeared in the Federal Register but has never even been adopted in a rule making.

St. Pe's Opposition takes a slightly different approach. Apparently conceding the fact that there is no support, either in the NPRM or in the Commission's Rules, for the proposition that Mr. Brady was required to file his competing expression of interest by the comment due date, St. Pe' launches an ad hominem attack whereby it claims that Mr. Brady must have known that his expression of interest was due by the comment due date inasmuch as Mr.

² See Crossroads Communications, Inc. *Opposition to Contingent Motion for Leave* at p.5.

Brady made extensive efforts to make sure that his expression of interest was received by the Commission by that date. Ignored by St. Pe' is the fact that Mr. Brady also faxed a second expression of interest to the Commission on the reply comment due date. Confronted with a situation in which neither the Rules nor the NPRM specified the date by which a competing expression of interest was required to be filed, Mr. Brady filed on both dates. Certainly Mr. Brady cannot be faulted for his attempt to make every effort to alert the Commission to his interest in the Utica allocation.³ In any event, St. Pe's ad hominem attack misses the point that neither the Notice nor the Commission's Rules required that the expression of interest be filed by the comment due date. Mr. Brady's expression of interest having been filed before the expiration of the period for the submission of reply comments in the proceeding, it was timely filed.

III. CONCLUSION

The Notice of Proposed Rule Making solicited competing expressions of interest for the Utica allocation. It did not specify the date by which such competing expressions of interest were required to be filed. Mr. Brady took numerous steps to alert the Commission to his interest in the channel. He

³ As was explained earlier to the Commission, Mr. Brady not only faxed his expression of interest to the Commission on the due date for the submission of comments, he also sent a hard copy of that expression of interest via same day delivery service and incurred a substantial expense in doing so. St. Pe' chides Mr. Brady for using a same day delivery service that relied upon a flight that was not due to depart Jackson, Mississippi until 1:50 p.m. Mr. Brady was unable, however, to use a same day delivery service leaving Jackson any earlier. Mr. Brady was under the impression that a consulting engineer whom he had been using was taking care of filing the competing expression of interest. On the morning of the date on which comments were due, Mr. Brady learned for the first time that the consulting engineer would be unable to submit Mr. Brady's expression of interest due to a fire at the engineer's residence. Not willing to leave himself open to attack that his expression of interest was untimely (even though the Notice of Proposed Rule Making did not specify the due date for the submission of expressions of interest), Mr. Brady made arrangements to have the hard copy of the expression of interest taken to Washington by the quickest means then at his disposal.

faxed an expression of interest to the Commission on the day on which comments were due to be filed.⁴ He sent hard copies of his expression of interest to the Commission on the day comments were due. He sent a further facsimile to the Commission on the day that reply comments were due. The Commission, as well as interested parties,⁵ thus received ample notice that Mr. Brady was interested in the Utica allocation. The purpose behind the expression of interest procedures -- namely that the Commission be made aware during the rule making process of the existence of interest in the

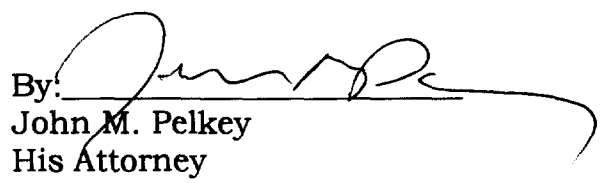
⁴ Curiously, St. Pe' belittles Mr. Brady's attempt to submit his expression of interest via fax whereas Crossroads, in its Reply Comments in this proceeding, stated that "Commission Rule 1.52 permits the filing of facsimile copies of pleadings and rule makings" Crossroads' Communications, Inc. Reply Comments at p.3. Clearly, if two attorneys can be at odds as to the appropriateness of the use of facsimile submissions, it is understandable that Mr. Brady, a non-attorney, could have operated under the assumption that the Commission accepts facsimile filings.

⁵ The NPRM specified that a copy of any comments were to be served upon counsel for the Petitioner. As was demonstrated in the *Contingent Motion for Leave*, Mr. Brady, in fact, served counsel for Petitioner, a fact that counsel for Petitioner does not dispute. It should be noted that, unlike the situation with respect to comments and reply comments, the Appendix to the NPRM did not specify that competing expressions of interest, which may be no more than a simple letter, must be accompanied by a Certificate of Service.

channel by parties other than the petitioner -- was well served by Mr. Brady's submissions and thus his expression of interest should be treated as timely filed and given due consideration in the above-captioned proceeding.

Respectfully submitted,

DONALD B. BRADY

By: 
John M. Pelkey
His Attorney

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703/841-0606
November 8, 1993

CERTIFICATE OF SERVICE

The undersigned, an employee of Haley, Bader & Potts, hereby certifies that the foregoing document was mailed this date by First Class U.S. Mail, postage prepaid, to the following:

Timothy K. Brady, Esq.
7113 Peach Court
P.O. Box 986
Suite 208
Brentwood, TN 37024

James R. Cooke, Esq.
Harris, Beach & Wilcox
1816 Jefferson Place, NW
Washington, D.C. 20036

November 8, 1993

A handwritten signature in cursive script, appearing to read "Pamela Britt", written over a horizontal line.